

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PHYTELLIGENCE, INC.,

Plaintiff,

v.

WASHINGTON STATE UNIVERSITY,

Defendant.

NO. 18-00405-RSM

STIPULATED PROTECTIVE ORDER

1. PURPOSES AND LIMITATIONS

Discovery in this case (Case No. 18-00405-RSM) (the “Action”) may involve production of confidential, proprietary, or private information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

1 **2. “CONFIDENTIAL” MATERIAL**

2 “Confidential” material shall include the following documents and tangible things
3 produced or otherwise exchanged:

- 4 • Documents that could disclose to competitors confidential information
5 concerning the prices charged to potential customers, business plans and
6 strategy of Phytelligence;
- 7 • Confidential internal documents relating to Phytelligence’s finances, including
8 internal financial reports and analyses;
- 9 • Agreements or documents containing confidential information that could
10 disclose to competitors confidential information concerning specific financial
11 terms;
- 12 • Confidential internal documents related to financial and sales data, peer group
13 analyses and franchisee sales and performance comparison data; and a party or
14 non-parties’ personal financial information; financial or personal information
15 (including but not limited to, private personal information (PPI), social security
16 numbers, driver’s license numbers, bank and credit card numbers, tax
17 information, disability information, and other intimate information not
18 publically available) ; information and documents that a party is legally or
19 contractually required to keep confidential; documents and information that are
20 in good faith believed to constitute or contain proprietary business information.

21 **3. SCOPE**

22 The protections conferred by this agreement cover not only confidential material (as
23 defined above), but also (1) any information copied or extracted from confidential material; (2)
24 all copies, excerpts, summaries, or compilations of confidential material; and (3) any
25

1 testimony, conversations, or presentations by parties or their counsel that might reveal
2 confidential material.

3 However, the protections conferred by this agreement do not cover information that is
4 in the public domain or becomes part of the public domain through trial or otherwise.

5 **4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL**

6 4.1 Basic Principles. A receiving party may use confidential material that is
7 disclosed or produced by another party or by a non-party in connection with this case only for
8 prosecuting, defending, or attempting to settle this litigation. Confidential material may be
9 disclosed only to the categories of persons and under the conditions described in this
10 agreement. Confidential material must be stored and maintained by a receiving party at a
11 location and in a secure manner that ensures that access is limited to the persons authorized
12 under this agreement.

13 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
14 ordered by the court or permitted in writing by the designating party, a receiving party may
15 disclose any confidential material only to:

16 (a) the receiving party’s counsel of record in this action, as well as employees of
17 counsel to whom it is reasonably necessary to disclose the information for this litigation;

18 (b) the officers, directors, and employees (including in house counsel) of the receiving
19 party to whom disclosure is reasonably necessary for this litigation, unless a party designates a
20 particular document or material produced as Attorney's Eyes Only;

21 (c) experts and consultants to whom disclosure is reasonably necessary for this
22 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
23 A);

24 (d) the court, court personnel, and court reporters and their staff;
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1 (e) copy or imaging services retained by counsel to assist in the duplication of
2 confidential material, provided that counsel for the party retaining the copy or imaging service
3 instructs the service not to disclose any confidential material to third parties and to immediately
4 return all originals and copies of any confidential material;

5 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
6 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
7 A), unless otherwise agreed by the designating party or ordered by the court. Pages of
8 transcribed deposition testimony or exhibits to depositions that reveal confidential material
9 must be separately bound by the court reporter and may not be disclosed to anyone except as
10 permitted under this agreement;

11 (g) the author or recipient of a document containing the information or a custodian or
12 other person who otherwise possessed or knew the information.

13 4.3 Filing Confidential Material. Before filing confidential material or discussing or
14 referencing such material in court filings, the filing party shall confer with the designating
15 party to determine whether the designating party will remove the confidential designation,
16 whether the document can be redacted, or whether a motion to seal or stipulation and proposed
17 order is warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and
18 the standards that will be applied when a party seeks permission from the court to file material
19 under seal.

20 **5. DESIGNATING PROTECTED MATERIAL**

21 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
22 party or non-party that designates information or items for protection under this agreement
23 must take care to limit any such designation to specific material that qualifies under the
24 appropriate standards. The designating party must designate for protection only those parts of
25 material, documents, items, or oral or written communications that qualify, so that other

1 portions of the material, documents, items, or communications for which protection is not
2 warranted are not swept unjustifiably within the ambit of this agreement. Mass, indiscriminate,
3 or routinized designations are prohibited. Designations that are shown to be clearly unjustified
4 or that have been made for an improper purpose (*e.g.*, to unnecessarily encumber or delay the
5 case development process or to impose unnecessary expenses and burdens on other parties)
6 expose the designating party to sanctions. If it comes to a designating party's attention that
7 information or items that it designated for protection do not qualify for protection, the
8 designating party must promptly notify all other parties that it is withdrawing the mistaken
9 designation.

10 5.2 Manner and Timing of Designations. Except as otherwise provided in this
11 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
12 ordered, disclosure or discovery material that qualifies for protection under this agreement
13 must be clearly so designated before or when the material is disclosed or produced.

14 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
15 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
16 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that
17 contains confidential material. If only a portion or portions of the material on a page qualifies
18 for protection, the producing party also must clearly identify the protected portion(s) (*e.g.*, by
19 making appropriate markings in the margins).

20 (b) Testimony given in deposition or in other pretrial or trial proceedings: the parties
21 must identify on the record, during the deposition, hearing, or other proceeding, all protected
22 testimony, without prejudice to their right to so designate other testimony after reviewing the
23 transcript. Any party or non-party may, within fifteen days after receiving a deposition
24 transcript, designate portions of the transcript, or exhibits thereto, as confidential.

1 (c) Other tangible items: the producing party must affix in a prominent place on the
2 exterior of the container or containers in which the information or item is stored the word
3 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant
4 protection, the producing party, to the extent practicable, shall identify the protected portion(s).

5 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
6 designate qualified information or items does not, standing alone, waive the designating party’s
7 right to secure protection under this agreement for such material. Upon timely correction of a
8 designation, the receiving party must make reasonable efforts to ensure that the material is
9 treated in accordance with the provisions of this agreement.

10 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

11 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
12 confidentiality at any time. Unless a prompt challenge to a designating party’s confidentiality
13 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
14 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
15 challenge a confidentiality designation by electing not to mount a challenge promptly after the
16 original designation is disclosed.

17 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
18 regarding confidential designations without court involvement. Any motion regarding
19 confidential designations or for a protective order must include a certification, in the motion or
20 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer
21 conference with other affected parties in an effort to resolve the dispute without court action.
22 The certification must list the date, manner, and participants to the conference. A good faith
23 effort to confer requires a face-to-face meeting or a telephone conference.

24 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
25 intervention, the designating party may file and serve a motion to retain confidentiality under

1 the applicable rules. The burden of persuasion in any such motion shall be on the designating
2 party. Frivolous challenges, and those made for an improper purpose (*e.g.*, to harass or impose
3 unnecessary expenses and burdens on other parties) may expose the challenging party to
4 sanctions. All parties shall continue to maintain the material in question as confidential until
5 the court rules on the challenge.

6 **7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED**
7 **IN OTHER LITIGATION**

8 If a party is served with a subpoena or a court order issued in other litigation that
9 compels disclosure of any information or items designated in this action as CONFIDENTIAL,”
10 that party must:

11 (a) promptly notify the designating party in writing and include a copy of the subpoena
12 or court order;

13 (b) promptly notify in writing the party who caused the subpoena or order to issue in
14 the other litigation that some or all of the material covered by the subpoena or order is subject
15 to this agreement. Such notification shall include a copy of this agreement; and

16 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
17 designating party whose confidential material may be affected.

18 **8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

19 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
20 confidential material to any person or in any circumstance not authorized under this agreement,
21 the receiving party must immediately (a) notify in writing the designating party of the
22 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
23 protected material, (c) inform the person or persons to whom unauthorized disclosures were
24 made of all the terms of this agreement, and (d) request that such person or persons execute the
25 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

1 **9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
2 **PROTECTED MATERIAL**

3 When a producing party gives notice to receiving parties that certain inadvertently
4 produced material is subject to a claim of privilege or other protection, the obligations of the
5 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
6 provision is not intended to modify whatever procedure may be established in an e-discovery
7 order or agreement that provides for production without prior privilege review. Parties shall
8 confer on an appropriate non-waiver order under Fed. R. Evid. 502.

9 **10. NON TERMINATION AND RETURN OF DOCUMENTS**

10 Within 60 days after the termination of this action, including all appeals, each receiving
11 party must return all confidential material to the producing party, including all copies, extracts
12 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
13 destruction.

14 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
15 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
16 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
17 work product, even if such materials contain confidential material. The confidentiality
18 obligations imposed by this agreement shall remain in effect until a designating party agrees
19 otherwise in writing or a court orders otherwise.

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD this 24th day of
2 October 2018.

3
4 s/Daniel A.
Brown

5 Daniel A. Brown, WSBA #22028
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s/Stuart R. Dunwoody per email authority
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12 PURSUANT TO STIPULATION, IT IS SO ORDERED this 30 day of October 2018.

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16 RICARDO S. MARTINEZ
17 CHIEF UNITED STATES DISTRICT JUDGE
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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name],
of _____ [print or type full
address], declare under penalty of perjury that I have read in its entirety and understand the
Stipulated Protective Order that was issued by the United States District Court for the Western
District of Washington on [_____] in the case
of _____. I agree to comply with and to be bound by all the terms of
this Stipulated Protective Order and I understand and acknowledge that failure to so comply
could expose me to sanctions and punishment in the nature of contempt. I solemnly promise
that I will not disclose in any manner any information or item that is subject to this Stipulated
Protective Order to any person or entity except in strict compliance with the provisions of this
Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Western District of Washington for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____